UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-10345-GAO

JAMES WARE,
Petitioner,

v.

STEVEN J. O'BRIEN, Superintendent, Old Colony Correctional Center,
Respondent.

OPINION AND ORDER
May 15, 2009

O'TOOLE, D.J.

I. Background

The petitioner, James Ware, was charged with several crimes after two men, Allan Hill and Peter Wattles, were attacked in Boston, Massachusetts on the evening of May 6, 1993. Ware was tried, along with his co-defendant Herdius Evans, in the Massachusetts Superior Court and convicted of armed assault with intent to rob as to both Hill and Wattles, first degree murder and armed robbery as to Hill, and assault and battery as to Wattles. He was sentenced to life in prison without parole for the murder of Hill, a consecutive term of life in prison for the armed robbery of Hill, and a consecutive term of eighteen to twenty years in prison for the armed assault on Wattles with intent to rob. The remaining charges were placed on file by the court. His convictions were affirmed by the Massachusetts Supreme Judicial Court ("SJC") on direct appeal pursuant to Massachusetts General Laws, ch. 278, § 33E. Commonwealth v. Evans, 778 N.E.2d 885 (Mass. 2002). He later filed a motion for a new trial, claiming juror misconduct. The motion was denied by the trial judge after two

evidentiary hearings. Shortly thereafter a single justice of the SJC denied Ware's application for leave to appeal the denial of the new trial motion. See Mass. Gen. Laws, ch. 278 § 33E. He now seeks a writ of habeas corpus from this Court pursuant to 28 U.S.C. § 2254.

The following summary of the facts of the case is taken from the opinion of the Massachusetts Supreme Judicial Court ("SJC") in Commonwealth v. Evans:

> The jury could have found the following facts. Shortly before 9 p.m. on May 6, 1993, Peter Wattles was walking through Sparrow Park in the South End section of Boston en route to his apartment on West Rutland Square. He passed by Evans and Ware, who were sitting on a park bench. They got up and followed him. Sensing that they were behind him, Wattles walked faster, but the defendants kept pace.
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> Wattles climbed the stairs to his apartment house and went to unlock the outer door. Ware, who stood just below him on the stoop, punched him in the head. Evans, who was taller and thinner than Ware, pointed a knife at Wattles and demanded his money. Wattles got a good look at both men from their position at the well-lit entrance. He produced his wallet and Ware punched him in the head a second time. Wattles lowered his wallet, fanning approximately $300 in front of them. As Evans and Ware were looking down at the money, Wattles jumped from the top step and fled. The defendants chased him as far as Columbus Avenue, a busy and well-lit street in the South End. Wattles crossed Columbus Avenue and went into a restaurant. After taking no more than five minutes to compose himself, Wattles telephoned the police.
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> While Wattles was inside the restaurant, Allan Hill, a student at the New England Conservatory of Music, left his apartment at 316 West Newton Street, near Sparrow Park, to return some bottles for deposit at a nearby liquor store on Columbus Avenue. He was attacked by two men near Sparrow Park, both of whom were pummeling him as he lay on the ground. The two men then fled down West Newton Street toward Columbus Avenue. Hill got up, then shakily crossed West Newton Street before collapsing from two stab wounds, one to the chest and one to the abdomen. An ambulance and several police cars arrived shortly. Hill was taken to a hospital, where he underwent extensive surgery.
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> Eyewitnesses described Hill's assailants as two African-American males, one of whom was taller and thinner than the other. The shorter and stockier of the two wore a whitish colored shirt with short sleeves that reached his forearms. One eyewitness had reported that the shirt of one of the assailants had been ripped off. One of the officers who first responded at the scene where Hill lay in the street followed a trail of blood across West Newton Street, where he found a wallet, Hill's identification and credit

cards, and a piece of dark blue cloth that appeared to be the collar of a T-shirt.

Wattles, who waited for officers outside the restaurant, heard the sirens of emergency vehicles responding to the Hill incident. Two officers in a marked cruiser picked him up within minutes of his telephone call. He told them what happened, and they drove him around the neighborhood to see whether he could identify his assailants, on the chance that they were still in the area. After about ten minutes, Wattles spotted the defendants walking together on West Newton Street. He indicated that they looked like the men who attacked him. As the cruiser approached, Ware started walking across the street. The cruiser stopped. One officer got out and asked to speak to Ware. Ware fled, but the officer caught him in an alley about one block away.

Evans also fled, in the opposite direction. The second officer pursued him down Newland Street in the cruiser. Evans ran through several yards, vaulting three eight-foot fences along the way. He ran down several streets before stopping and blending into a crowd of people. The officer spotted him. As the officer approached, Evans threw a knife into a nearby yard. He was handcuffed, and the knife was recovered.

Immediately after their arrest, Evans and Ware, separately, were brought to Wattles, who positively identified both men as his assailants. The defendants were then taken to the location on West Newton Street where Hill had collapsed. There, one witness identified them as having the same physical build as the men he saw fleeing the scene of the attack on Hill about one half hour earlier, but he noted that the shorter and stockier man (Ware) was no longer wearing a white shirt.

It was learned from the booking procedure that Evans and Ware were brothers and that they lived at 414 Columbus Avenue, just three blocks from where Hill had been attacked. Two detectives went to that residence in search of evidence that Ware had changed clothes after the Hill stabbing. In particular, they were looking for a white, short-sleeved shirt. They arrived at about 10 p.m. that same night and were greeted by Garry Edouard, the defendants' younger brother, who told them that Ware had in fact come home that evening and changed his shirt. He led them to an upstairs bedroom where he and the two defendants slept, and produced a white T-shirt with blue sleeves. He told the detectives, “This is what you're looking for.” The detectives told him to put down the shirt. They summoned a uniformed officer to guard the room while they applied for a search warrant.

The detectives returned to 414 Columbus Avenue at 1 a.m. on May 7, 1993, with a search warrant, and seized the shirt Edouard had produced. While they were there, they spoke with the mother of the defendants, who gave them a dark blue T-shirt that Evans had worn that evening. The shirt was torn and a piece was missing. A criminalist positively matched the dark blue piece of cloth found near Hill’s wallet to

> Evans's torn shirt. Blood on the blade of the knife Evans had thrown to the ground was consistent with Hill's DNA. Hill died from sepsis, or bacterial infection, as a consequence of his stab wounds.

778 N.E.2d at 890–91.

Ware argues four grounds in support of the habeas petition. Ground one is that Ware's Sixth Amendment rights were violated when a juror allegedly took an unauthorized view of the crime scene and used an experiment he conducted there to convince himself and/or other jurors of the defendant's guilt. In ground three,[1] Ware argues that the trial judge erroneously excluded a hearsay statement by an eyewitness that the defendants were not the perpetrators; he contends that the hearsay should have been admitted either as an excited utterance or under the Due Process Clause of the Fourteenth Amendment pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973). Ground four is a claim that the trial judge excluded all college students from jury service as a matter of policy, in violation of the Sixth Amendment's "fair cross-section" requirement. See Taylor v. Louisiana, 419 U.S. 522, 531 (1975). Additionally, Ware claims that the evidence at trial was insufficient to support the verdict. See Jackson v. Virginia, 443 U.S. 307 (1979).[2]

[1] The parties agreed at oral argument that ground two of the petition—regarding the petitioner's exclusion from the jury's official view of the scene—was not briefed on the merits and is properly deemed waived.

[2] The sufficiency claim was not made in the petition, although the petitioner exhausted the claim in state court and both parties briefed the issue in their submissions to this Court. At oral argument the Court suggested, and the parties agreed, that because this ground had been fully addressed by them, the habeas petition will be considered amended to include it.

II. Ground One — The Juror Misconduct Claim

In his first ground, the petitioner asserts that the jury was exposed to extraneous information during deliberations in violation of his rights under the Sixth Amendment to be tried before an impartial jury and to confront the witnesses against him. See U.S. Const. am. VI; Parker v. Gladden, 385 U.S. 363, 364 (1966).

On November 13, 2003, Ware filed a motion for a new trial supported by an affidavit from Ware's trial counsel, Benjamin Entine. The single justice who later denied further appeal of the new trial motion summarized the affidavit and subsequent evidentiary hearings:

> In his affidavit, Attorney Entine averred that, in a approximately July, 2003, he was approached in a Cambridge supermarket by a man who recognized him and said he had been a juror in the defendants' trial. The juror complimented Entine on his defense, and said that he was particularly impressed by the attorney's contention that Ware could not have run the distances (necessary to commit the crimes and do the other activities attributed to him by the Commonwealth) in the allotted time. According to the juror, the time discrepancy caused the jury to be deadlocked regarding Ware's guilt. The juror said that he had returned to the scene, timed how long it took him to run Ware's alleged route, and "brought the results of the tests he [had] performed in to the jury deliberations," and "employed them to persuade the last juror holding out for … acquittal."
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> At the first evidentiary hearing, Attorney Entine testified consistently with the contents of his affidavit, and added that [the juror] reported that he brought his test results "in to the jury" and "that's what convinced them." The attorney also stated that he had contacted Ware's appellate attorney, James Sultan, soon after the incident, but had been told that Sultan no longer represented Ware. In September of 2003, upon being contacted by Ware's current attorney, he had reported the incident to her.
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> At the second hearing, the juror at issue, Peter Sherin, testified that he had had a conversation with Attorney Entine in a supermarket, but stated that Entine had recognized him, the juror. He "categorically" and repeatedly denied that he had ever revisited the scene after the authorized jury view. The foreperson of the jury testified that she was not aware that any juror visited the scene during deliberations, and that she did not recall anyone mentioning such a visit or any other extraneous information during deliberations.

(Supp. Ans. Ex. N at 3–4.)

The trial judge made the following findings of fact in denying the motion for a new trial after the second evidentiary hearing:

> Attorney Benjamin D. Entine has been a lawyer for 28 years. As of 1998, he had been a member of the Massachusetts Bar for nine years. Attorney Entine tried most of his cases in the United States District Court in Boston during the years 1994 through 1998. In fact, the James Ware trial was the first murder case assigned to Attorney Entine by [the Committee for Public Counsel Services].
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> The testimony of Mr. Entine concerning his July 2003 conversation with a juror, in particular, the part about the juror taking an independent view of the scene, running tests and reporting back to the deliberating jury, is simply not credible to this Court. He is directly contradicted by the juror, Mr. Sherin, whom Entine confirmed was the person with whom he had the Bread & Circus encounter.
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> On the other hand, the juror, Mr. Sherin, appeared to the court to be reliable, highly educated (with an M.B.A. degree) and credible. Moreover, Mr. Sherin's testimony was corroborated by the forewoman of the jury, Andrea McDonough, a highly educated teacher from Revere (with a Masters degree, plus fifteen credits). When both of these witnesses testified, they did not know what the hearing was about. The were both forthright, credible, and without any hesitation in their answers.
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> In addition, this Court has considered the circumstances and timing under which Mr. Entine revealed the subject matter of the alleged jury impropriety. James Ware was convicted on all counts against him, including first degree murder, meaning that he would be imprisoned for the rest of his life with no hope of parole. Mr Entine alleges that his conversation with the juror occurred around July of 2003, almost five years after Ware's sentencing. Mr. Entine testified that he called the office of attorney James Sultan after his encounter with the juror to see if his office still represented Mr. Ware. Upon learning that James Sultan's office no longer represented Ware, Mr. Entine simply let the matter drop. Attorney Entine continued to do nothing until Attorney Elaine Pourinski telephoned him in September of 2003. Only then, more than two months later, did Mr. Entine reveal[] his alleged conversation with the juror.
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> As noted, Mr. Entine has tried major jury cases in the United States District Court. In addition, he has been involved as co-counsel in another first-degree murder case in Superior Court. Given this background, it can reasonable be assumed that Mr. Entine should have known that a juror's independent view of a crime scene, if proved, could result in a new trial for the defendant, in this case, James Ware.
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> Despite the fact that his former client, who had been convicted and imprisoned for the last five years, now had grounds to argue for a new trial, Attorney Entine did nothing until he was contacted by Attorney Pourinski in September 2003. This judge finds it totally incredible that a trial lawyer, such as Mr. Entine, would obtain such

> information and not immediately call it to someone's attention. In sum, this Court rejects the testimony of Attorney Entine regarding his conversation with Peter Sherin, and instead, credits the testimony of both Peter Sherin and Andrea McDonough, finding that there was no extraneous information, resulting from an independent view of the crime scene, introduced into or discussed during jury deliberations.

(Supp. Ans. Ex. K at 6–9)) (footnotes and citations omitted).

The trial judge then applied the two step procedure set forth in Commonwealth v. Kincaid: "First, the defendant 'bears the burden of demonstrating that the jury were in fact exposed to the extraneous matter. To meet this burden [the defendant] may rely on juror testimony.' If the defendant meets this burden and the judge finds that extraneous matter came to the attention of the jury, 'the burden then shifts to the Commonwealth to show beyond a reasonable doubt that [the defendant] was not prejudiced by the extraneous matter.'" 828 N.E.2d 45, 49 (Mass. 2005) (quoting Commonwealth v. Fidler, 385 N.E.2d 513, 519 (Mass. 1979)). The second step of this inquiry was never reached because the judge found that no extraneous information was introduced. The motion was denied on that basis.

The petitioner unsuccessfully sought leave from a single justice of the SJC to pursue further appellate review pursuant to Massachusetts General Laws, ch. 278, § 33E. The single justice wrote:

> A judge's finding of credibility is "final and conclusive" on appeal. Commonwealth v. Sparks, 433 Mass. 654, 661 (2001). Credibility is for the factfinder, not an appellate court. Commonwealth v. John, 442 Mass. 329, 335 (2004), citing Commonwealth v. Rivera, 424 Mass. 266, 269 (1997), cert. denied, 525 U.S. 934 (1998). The standard of review of findings made in a postverdict inquiry is clear error. "We accept [the judge's] finding unless clearly erroneous." Commonwealth v. Kincaid, supra at 383–384. "[A] finding of fact by the trial judge will not be deemed 'clearly erroneous' unless the reviewing court on the entire evidence is left with the firm conviction that a mistake has been committed." Commonwealth v. Tavares, 385 Mass. 140, 156, cert. denied, 457 U.S. 1137 (1982), quoting New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675 (1977).
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> Here, the judge was confronted with two diametrically opposed statements. The two versions cannot be reconciled. Resolution of this conflict of credibility is for the motion judge. Commonwealth v. Sparks, supra at 661. His findings were based on his

assessment of the credibility of the witnesses. Nothing in the record indicates plain error; thus, we accept his credibility determination.

The question then becomes whether the judge's credibility determination was made after sufficient inquiry, whether he questioned sufficient jurors or whether it was necessary, as the defendants requested, to question the entire jury. A judge faced with a claim of extraneous influence has discretion regarding how to proceed. See Commonwealth v. Fidler, supra at 203 (judge "may make such order as he deems appropriate . . . . He may decide to deny the request [to examine the jurors]); Commonwealth v. Lazarovich, 410 Mass. 466, 478 (1991) (judge acted within his discretion in declining to hold further evidentiary hearings on issue of extraneous information).

Here, the judge acted within his discretion in declining to examine the remaining jurors.* The judge made adequate inquiry to satisfy himself and was provided no reason to believe that further questioning was needed.

> * The defendants suggest that juror Sherin may have reported his result to a group of jurors that did not include the foreperson, and that, therefore, the foreperson may not have heard Sherin relating the result of his visit to the scene. There is no basis to support this hypothesis. Moreover, if further inquiry were to be made, all the remaining jurors would have to be questioned. The judge has no means of identifying the one or more jurors to whom Sherin may have made the statement.

Accordingly, the defendants cannot establish a "substantial question" to be addressed by the full court. Their claims that the judge's findings of credibility were erroneous cannot succeed because the appellate court "defers to the judge's role in assessing juror credibility." Commonwealth v. Kincaid, supra at 389. In addition, my own reading of the transcript of the hearings reveals nothing to undermine the judge's findings.

(Supp. Ans. Ex. N at 5–7.)

Habeas relief can be granted if the state court adjudication of the petitioner's claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.").

Ware's argument is that the trial judge's factual determination that the jury verdict had not been affected by extraneous information was an "unreasonable" one under this standard. His fundamental contention is that it was unreasonable for the trial judge not to have credited Entine's testimony instead of the testimony from the jurors Sherin and McDonough. As a general matter, credibility judgments by a judge who has heard and seen witness testimony first hand are given deference. See Rice v. Collins, 546 U.S. 333, 341–42 (2006) ("Reasonable minds reviewing the record might disagree about the prosecutor's credibility [in articulating a race-neutral justification for a peremptory strike], but on habeas review that does not suffice to supercede the trial court's credibility determination."); Miller-El, 537 U.S. at 339 ("Deference is necessary because a reviewing court … is not as well positioned as the trial court to make credibility determinations."). Moreover, in the habeas context, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1).

It may be possible to conceive of a case where a trial judge's credibility judgment is so at odds with overwhelming evidence supporting a contrary conclusion that the judgment could be said to be unreasonable, but this is not that case. The judge interviewed both Entine and Sherin about their supermarket conversation, and they gave differing accounts of what was said. He also interviewed the jury foreman, whose testimony tended to support Sherin's assertion that he had not brought any

extraneous information to the jury deliberations. The latter issue, the possibility of an extraneous influence on the jury, was the main concern. As to that, the two jurors were in agreement that there had not been any such influence. Entine's version, even if credited, would have impeached Sherin's denial that he described to the jury an experiment he conducted at the crime scene, but it would have left unaffected the jury foreman's testimony that there had been no such discussion in the jury deliberations. A potentially important factor that may have influenced the judge was that the foreman had not been told of the supermarket conversation and had no idea why she was being asked about the deliberations. If either of the others may have had a motive, conscious or unconscious, to skew his account, she plainly did not.

Factfinding is about resolving conflicts in the evidence, and the evidence often permits a range of possible resolutions. The rules of deference applicable here require accepting the credibility judgments of the factfinder. They are plausible on the record and, thus, not unreasonable.

Ware also argues that this Court should conduct an evidentiary hearing on the question of extraneous influence, with all the other trial jurors as witnesses. In deciding whether to hold an evidentiary hearing, a federal habeas court must take account of the deferential standards of § 2254. Schriro v. Landrigan, – U.S. –, 127 S. Ct. 1933, 1940 (2007). The court "must consider whether such a hearing could enable an applicant to prove the petition's factual allegations." Id. To show that a hearing would assist the proof of the petition's allegations, the petitioner must show that "the hearing is likely to elicit factual support for [his] allegations." Teti v. Bender, 507 F.3d 50, 62 (1st Cir. 2007). Ware has not done that. He does not say – he is not able to say – that the other jurors if called would support his allegation of extraneous influence. In substance, his purpose is to find out what they would say. In other words, he wants a hearing to discover whether there is evidence in support of his claim, not to present evidence he reasonably believes exists. That is an insufficient reason for an

evidentiary hearing, and his request for such a hearing is denied.

III. Ground Three — Exclusion of a Hearsay Statement

At trial, the petitioner sought to admit testimony from a police officer that an eyewitness to the attack on Hill was confronted at the scene with the defendants shortly after the attack and stated that they were not the perpetrators. The statement was excluded as hearsay.

The petitioner argues that the trial court erred by failing to admit the statement as a spontaneous utterance. This is an issue of state law that is not cognizable on habeas review. See Estelle v. McGuire, 502 U.S. 62, 67 (1991).

The petitioner also argues that the exclusion of the statement violated the Due Process Clause of the Fourteenth Amendment and that the statement should have been admitted under the holding of Chambers v. Mississippi, 410 U.S. 284 (1973). This argument is unpersuasive because the out of court statement here lacks the indicia of reliability that were crucial to the Chambers decision. See 410 U.S. at 300 ("The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."). The SJC explained that the trial judge "expressly found that the evidence was not reliable," and rejected the petitioner's Chambers argument. Evans, 778 N.E.2d at 897. The state courts' determination of this issue was not an unreasonable application of clearly established federal law.

IV. Ground Four — Exclusion of College Students

The petitioner argues that the trial judge excluded from jury service, as a matter of policy, all college students who indicated that the length of the trial would cause them to miss classes, and that this violated his Sixth Amendment right to a jury drawn from a fair cross section of the community. See Taylor v. Louisiana, 419 U.S. 522, 531 (1975). Even assuming that the judge excused college students as a matter of "policy," rather than in response to actual assertions of hardship as the SJC held, see Evans, 778 N.E.2d at 893 ("We are satisfied that the judge's decision to excuse each of the ten college students on the basis of hardship was based on individual circumstances and not on the basis of any policy…."), this claim still fails.

A prima facie violation of the Sixth Amendment's fair cross section requirement requires showing "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusions of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 363 (1979).

The petitioner acknowledges that courts have refused to classify young adults as a distinctive group for Sixth Amendment purposes. However, he argues that college students should be considered to constitute such a group because the Supreme Court has suggested in dictum that groups comprised of "postmen, or lawyers, or clergymen, or any number of other identifiable groups" would qualify. See Holland v. Illinois, 493 U.S. 474, 486 (1990). In making this argument the petitioner necessarily acknowledges that Supreme Court has not "clearly established" the principle that college students should be treated as a "distinctive group" for Sixth Amendment purposes. The state courts therefore did not misapply any Supreme Court precedent to the facts of the petitioner's case. See Williams v.

Taylor, 529 U.S. 120, 407 (2000) (O'Connor, J., Opinion of the Court) (explaining that one way a decision would constitute an "unreasonable application" of clearly established Supreme Court law under 28 U.S.C. § 2254(d)(1) is "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular prisoner's case.").

A petitioner may also show an unreasonable application if the state court unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context where it should apply. Id. However, the petitioner's only argument in support of his contention that college students constitute a "distinctive" group for Sixth Amendment purposes is that "[c]learly, college students comprise such an identifiable group." (Pet'r's Mem. in Supp. of Pet. for a Writ of Habeas Corpus 20.) That proposition is not clear, by any means. See, e.g., Anaya v. Hansen, 781 F.2d 1, 3 (1st Cir. 1986) (neither young adults nor blue collar workers are distinctive groups); Barber v. Ponte, 772 F.2d 982, 986–89 (1st Cir. 1985) (en banc) (young adults are not a cognizable group); see also Ford v. Seabold, 841 F.2d 677, 681 (6th Cir. 1988) (young adults and college students are not distinctive groups).The state court decision was not contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court. See 28 U.S.C. § 2254(d)(1).

IV. The Additional Ground — Sufficiency of the Evidence

The petitioner claims that the evidence against him was constitutionally insufficient to support a finding of guilty beyond a reasonable doubt as to the crimes against Hill, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments, and that the SJC's adjudication of this claim was unreasonable. See Jackson v. Virginia, 443 U.S. 307, 316 (1979). This claim would fail even if this Court's review were *de novo*, and falls far short of overcoming the deferential standard of 28 U.S.C. § 2254(d)(1). There was ample, if not overwhelming, evidence of the petitioner's guilt, all of which need not be recited here. See Evans, 778 N.E.2d at 891–92. The SJC's determination that the

evidence was sufficient was not an unreasonable application of Jackson.

IV. Conclusion

For the foregoing reasons, the petitioner has not shown that he is entitled to federal habeas relief, and the petition for a writ of habeas corpus is DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge